

42 IAC 1-5-10 Benefiting from confidential information (IC 4-2-6-6)
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42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)

The Indiana Inspector General is considering leaving his post to pursue work as a senior prosecutor and to provide legal services to a private college. SEC found that the IG's position would not require him to participate in any decision or vote in which he or the private college would have a financial interest in the outcome of the matter. Moreover, SEC found that the IG's prospective employment opportunities are not subject to the one-year cooling off period. However, SEC determined that the IG would be prohibited by the Postemployment rule's particular matter restriction from participating in any matter, including investigations, judicial proceedings, and/or lawsuits, that he may have personally and substantially participated in during his tenure with the State.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to I.C. 4-2-6-4(b)(1).

BACKGROUND

A state employee is the Indiana Inspector General ("IG"). The IG is a position appointed by the Governor. He has served in this capacity since 2005.

The state employee is considering leaving his post as IG to pursue work as a senior prosecutor given the recent statutory change that allows a qualifying individual to work as a senior prosecutor on a full-time, instead of a part-time, basis. As a senior prosecutor, the Inspector General would be eligible for appointment by trial court judges to prosecute cases if and when an elected prosecutor has a conflict of interest. He recently had discussions with judges and prosecutors in the Wabash Valley area. While he has not received any commitments regarding the assignment of cases, he received favorable responses from these individuals to actively pursue this career opportunity. In addition, the Inspector General is also inquiring about the possibility of providing legal services to a private college ("Private College") to receive health insurance benefits.

The Inspector General would not lobby the executive branch of state government. Also, there are no contracts between the Office of the Inspector General ("OIG") and these potential post-employers. The Inspector General does not regulate or make licensing decisions regarding either of these intended post-employers.

Regarding particular matters, the Inspector General indicates that he has participated in various investigations, judicial proceedings, and/or lawsuits throughout his tenure with the State. While most matters that could possibly come before a trial court judge are closed, it is possible that a judge may attempt to appoint the Inspector General as a senior prosecutor on any one of those actions. He would decline work on any of those matters.

ISSUE

What rules in the Code of Ethics (“Code”) apply to the Inspector General’s intended employment opportunities, and would his acceptance of either or both positions subject him to any post-employment restrictions under I.C. 4-2-6-11?

RELEVANT LAW

I.C. 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

I.C. 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

I.C. 4-2-6-11 (42 IAC 1-5-14)

One year restriction on certain employment or representation; advisory opinion; exceptions

Sec. 11. (a) As used in this section, "particular matter" means:

- (1) an application;
- (2) a business transaction;
- (3) a claim;
- (4) a contract;
- (5) a determination;
- (6) an enforcement proceeding;
- (7) an investigation;
- (8) a judicial proceeding;
- (9) a lawsuit;
- (10) a license;
- (11) an economic development project; or
- (12) a public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
 - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
 - (B) in a position to make a discretionary decision affecting the:
 - (i) outcome of the negotiation; or
 - (ii) nature of the administration; or

(3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer; before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of his or her duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) representation by; or
- (3) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to a special state appointee who serves only as a member of an advisory body.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under I.C. 4-22-2 to establish criteria for post employment waivers.

ANALYSIS

The Inspector General's intended employment opportunities invoke consideration of the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Inspector General is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Inspector General from accepting any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature. Based on the information provided, it does not appear that any possible offer of employment by either a judge or the Private College would result from information of a confidential nature. Accordingly, the Inspector General intended employment opportunities would not appear to violate I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Inspector General from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including himself or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment. In this case, it appears that the Inspector General has an arrangement for prospective employment with the Private College. Accordingly, the Inspector General would be prohibited from participating in any decision or vote in which he or the Private College would have a financial interest in the outcome of the matter. The state employee's role as IG would not appear to require him to participate in any decision or vote in which he or the Private College would have a financial interest. Moreover, it does not appear that employment negotiations have begun with any judges, but to the extent that they have, it also does not appear that the state employee's role as IG would require him to participate in any decision or vote in which his intended special prosecutor employers would have a financial interest. To the extent that the Inspector General complies with this provision and continues to abstain from participating in any potential decision or vote that may arise in which he or his intended employers have a financial interest in the outcome of the matter for the remainder of his state employment, and ensures compliance with I.C. 4-2-6-9(b) if a potential conflict of interest

arises, it does not appear that the Inspector General's intended post-employment ventures would violate I.C. 4-2-6-9.

C. Post-Employment

I.C. 4-2-6-11 consists of two separate limitations: a "cooling off" period and a "particular matter" restriction. The first prohibition commonly referred to as the cooling off period, prevents the Inspector General from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Inspector General is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration. The Inspector General does not anticipate engaging in any lobbying activities in either of his prospective employment opportunities. To the extent the Inspector General ensures compliance with this provision for the entirety of the cooling off period, it does not appear that his intended post-employment opportunities would violate this provision of the rule.

Second, the Inspector General is prohibited from accepting employment for 365 days from the last day of his state employment from an employer with whom he 1) engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract. In this case, the Inspector General indicates that he has never negotiated or administered a contract with his intended employers on behalf of the State. Accordingly, it does not appear that this restriction applies to the Inspector General.

Third, the Inspector General is prohibited from accepting employment for 365 days from the last day of his state employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. This restriction does not apply to the Inspector General's intended employment opportunities because he did not make regulatory or licensing decisions during his tenure with the State.

Fourth, the Inspector General is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence him in his official capacity as a state employee. The information presented to the Commission does not suggest that any offers of employment that have been or will be extended to the Inspector General were made in an attempt to influence him in his capacity as a state employee. Accordingly, it does not appear that this restriction applies to the Inspector General's intended employment opportunities.

Finally, the Inspector General is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a

claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

In this case, the Inspector General indicates that he has participated in various investigations, judicial proceedings, and/or lawsuits throughout his tenure with the State that would qualify as particular matters for purposes of this rule. However, most of these matters have been closed or finalized. Moreover, the Inspector General would decline to work on any particular matter, including investigations, judicial proceedings, and/or lawsuits that he may have personally and substantially participated in during his tenure with the State. To the extent that he complies with this provision, the Inspector General would not be in violation of this section of the post-employment rule.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction against executive branch lobbying, the Commission finds the Inspector General's intended post-employment activity would not violate the post-employment restrictions found in I.C. 4-2-6-11 or any other rule of the Code.

Regarding conflicts of interest, the Commission finds that a potential conflict of interest does not and is unlikely to arise in the execution of his duties for the remainder of his tenure with the State because the Inspector General's intended post-employers are not subject to the jurisdiction of the OIG.